

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 June 2006

In the Matter of:

JULIA ROBERTS, widow of
HARMON ROBERTS
Claimant

Case No.: 2005 BLA 31

v.

ROYALTY SMOKELESS COAL COMPANY.
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

Appearances:

Mr. Joseph E. Wolfe, Attorney
Mr. W. Andrew Delph, Attorney
For the Claimant

Mr. Christopher M. Hunter, Attorney
For the Employer

Before:

Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER –
DENIAL OF SECOND MODIFICATION REQUEST**

This matter involves a claim filed by Mrs. Julia Roberts, widow of Mr. Harmon Roberts, for survivor benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 (“the Act”). Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as “black lung” disease.

Procedural Background

Mr. Roberts' Black Lung Disability Claims

Initial Claim (DX 1)¹

On April 11, 1983, Mr. Roberts filed his first claim for black lung disability benefits. Eventually, Administrative Law Judge Robert S. Amery denied the claim on April 28, 1988 because Mr. Roberts failed to prove total disability due to coal workers' pneumoconiosis. Following an appeal, the Benefits Review Board affirmed the denial of benefits on October 30, 1989 and later denied an untimely Motion for Reconsideration.

Second Claim (DX 2)

On May 23, 1997, Mr. Roberts filed a second claim. On July 31, 1998, the District Director denied the claim for failure to establish total disability due to coal workers' pneumoconiosis. Shortly thereafter, Mr. Roberts filed additional medical evidence which was considered to be a modification request. The District Director denied the modification request on September 14, 1998.

Mrs. Roberts' Survivor Claim

After her husband's death on February 18, 2000, Mrs. Roberts filed a survivor claim for benefits on April 7, 2000 (DX 3 & DX 7). On October 3, 2000, her claim was denied because the medical evidence failed to establish that her husband's death was due to coal workers' pneumoconiosis (DX 9). On September 2001, Mrs. Roberts requested to withdraw her claim (DX 15). However, since the denial had become final, her correspondence was treated as a modification request (DX 16) and denied on December 20, 2001 for failure to establish a mistake of fact (DX 18). Mrs. Roberts appealed the adverse decision on January 18, 2002 (DX 18) and the case was forwarded to the Office of Administrative Law Judges ("OLAJ") on January 30, 2002. After two continuances, Administrative Law Judge Mollie W. Neal conducted a hearing on May 21, 2003 (DX 42). On September 17, 2003, Judge Neal denied Mrs. Roberts' modification request because the preponderance of the medical opinion established that Mr. Roberts' death was not due to coal workers' pneumoconiosis (DX 43). On May 6, 2004, through counsel, Mrs. Roberts submitted a second modification request and requested 90 days to provide additional information (DX 44). On January 6, 2005, Mrs. Roberts' modification request was forwarded to OALJ (DX 48). Pursuant to a Notice of Hearing, dated February 15, 2005, I set a hearing date of May 12, 2005 (ALJ I). However, on May 5, 2005, Mrs. Roberts' counsel requested a decision on the record, to which Employer's attorney did not object. On May 17, 2005, I agreed to render a decision on the record and provided the parties an opportunity to submit additional evidence through June 15, 2005 (ALJ II). To date, I have not received any

¹The following notations appear in this decision to identify exhibits: DX – Director exhibit and ALJ – Administrative Law Judge exhibit.

additional evidence from the parties. Accordingly, my decision is based on the record forwarded to OALJ, DX 1 to DX 49.

ISSUE

Whether in filing a second modification request on May 6, 2004, Mrs. Roberts has demonstrated a mistake in determination of fact occurred in denial of her first modification request by Administrative Law Judge Mollie W. Neal on September 17, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Findings

Born on August 22, 1920, Mr. Roberts married Mrs. Julia Roberts in March 1999.² He started mining and hauling coal in 1935. During World War II, Mr. Roberts served with the U.S. Army in France and Germany. Upon return from the war, Mr. Roberts continued working in and around coal mines through September 1982, when he was laid off. In his last job as a coal miner, Mr. Roberts worked several years for the Employer as a scale man, weighing coal trucks and sampling coal prior to the coal proceeding into the tipples for processing. He smoked a pack of cigarettes a day between 1935 and 1951. Mr. Roberts passed away on February 18, 2000 (DX 1, DX 2, DX 7, and DX 42).

Issue #1 – Modification

Any party to a proceeding may request modification at any time before one year from the date of the last payment of benefits or at any time before one year after the denial of a claim. 20 C.F.R. § 725.310 (a). Upon the showing of a "change in conditions" or a "mistake in a determination of fact," the terms of an award or the decision to deny benefits may be reconsidered. 20 C.F.R. § 725.310. An order issued at the conclusion of a modification proceeding may terminate, continue, reinstate, increase or decrease benefit payments or award benefits.

Since the present modification request relates to Mrs. Roberts' survivor claim, evaluation of the record for a change in conditions is not warranted.³ Instead, the focus in modification proceedings in a survivor claim concerns a mistake of fact analysis. In *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971), the United States Supreme Court indicated that an administrative law judge should review all evidence of record to determine if the original decision contained a mistake in a determination of fact. In considering a motion for modification, the administrative law judge is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further

²The record does not contain a marriage certificate. At the hearing before Judge Neal, Mrs. Roberts testified that Mr. Roberts passed away about a month before they had been married one year (DX 42).

³Since Mr. Roberts has passed away, there can be no change in conditions concerning his pulmonary condition since the denial of Mrs. Roberts' first modification request.

reflection on the evidence initially submitted." See also *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *Director, OWCP v. Drummond Coal Co. (Cornelius)*, 831 F.2d 240 (11th Cir. 1987).

My determination of whether a mistake in determination of fact occurred during the prior adjudication of Mrs. Roberts' survivor claim involves the four entitlement elements that a claimant must prove by a preponderance of the evidence to receive survivor benefits under the Act and 20 C.F.R. § 718.205 (a). The claimant bears the burden of establishing these elements by a preponderance of the evidence. If the claimant fails to prove any one of the requisite elements, the survivor claim for benefits must be denied. *Gee v. W. G. Moore and Sons*, 9 B.L.R. 1-4 (1986) and *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985).

First, the claimant must establish eligibility as a survivor. A surviving spouse may be considered eligible for benefits under the Act if she was married to, and living with, the coal miner at the time of his death, and has not remarried.

Second, the claimant must prove the coal miner had pneumoconiosis. "Pneumoconiosis" is defined as a chronic dust disease arising out of coal mine employment. The regulatory definitions include both clinical pneumoconiosis (the diseases recognized by the medical community as pneumoconiosis) and legal pneumoconiosis (defined by regulation as any chronic lung disease arising out of coal mine employment). The regulation further indicates that a lung disease arising out of coal mine employment includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." As courts have noted, under the Act, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. *Kline v. Director, OWCP*, 877 F.2d 1175 (3d Cir. 1989).

Third, once a determination has been made that a miner had pneumoconiosis, it must be determined whether the coal miner's pneumoconiosis arose, at least in part, out of coal mine employment.

Fourth, the surviving spouse has to demonstrate the coal miner's death was due to pneumoconiosis.

Eligible Survivor

Based on Mrs. Roberts' sworn testimony (DX 42), and absent evidence to the contrary, I find Mrs. Roberts is an eligible survivor under the Act.

Pneumoconiosis

Although the radiographic and clinical evidence of pneumoconiosis was inconclusive, every physician to review the pathological evidence from the autopsy of Mr. Roberts' lungs concluded that he had simple coal workers' pneumoconiosis. Specifically, Dr. Harnsberger, Dr. Ranavaya, Dr. Naeye, Dr. Bush, Dr. Branscomb, Dr. Morgan, Dr. Rosenberg, Dr. Perper, and Dr. Castle diagnosed simple pneumoconiosis. As a result, the undisputed medical opinion and

autopsy/biopsy evidence establishes the presence of pneumoconiosis in Mr. Roberts' lungs under 20 C.F.R. §§ 718.202 (a) (2) and (4).

Pneumoconiosis Arising Out of Coal Mine Employment

Once the existence of pneumoconiosis has been proven, 20 C.F.R. § 718.203 (a) requires that the pneumoconiosis must have arisen at least in part from the miner's coal mine employment. According to 20 C.F.R. § 718.203 (b), if a miner was employed in coal mining for ten or more years, a rebuttable presumption that the pneumoconiosis is due to coal mine employment exists.

In his adjudication of Mr. Roberts' first claim, Judge Amery determined Mr. Roberts had over 25 years of coal mine employment. In her consideration of Mrs. Roberts' first modification request, Judge Neal reached a similar conclusion. Upon my review of the record, I find no mistake of fact in the determination that Mr. Roberts worked over 25 years in coal mining.

Based on Mr. Roberts' extensive history of coal mine employment, the causation presumption under 20 C.F.R. § 718.203 (b) is invoked. Based on that presumption, and absent any evidence to the contrary, I find Mr. Roberts' pneumoconiosis arose out of his coal mine employment.

Death Due to Pneumoconiosis

In Mrs. Roberts' case, the first three elements of entitlement have been established. Specifically, Mrs. Julia Roberts is an eligible survivor under Act; Mr. Harmon Roberts had pneumoconiosis; and, his pneumoconiosis arose out of his coal mine employment. Consequently, the resolution of Mrs. Roberts' second, and present, modification request involves an evaluation of the record to determine whether a mistake of fact occurred in Judge Neal's determination that denial of Mrs. Roberts' first modification request was appropriate because Mr. Roberts' death was not caused by coal workers' pneumoconiosis.

For a survivor claim filed on or after January 1, 1982, the Department of Labor regulations provide four means by which to establish that a coal miner's death was due to coal workers' pneumoconiosis:

1. The miner had complicated pneumoconiosis;
2. Death was caused by pneumoconiosis;
3. Death was caused by complications of pneumoconiosis; or,
4. Pneumoconiosis was a substantially contributing cause or factor leading to the miner's death.

However, a survivor may not receive benefits if the coal miner's death was caused by traumatic injury, or the principal cause of death was a medical condition not related to pneumoconiosis, unless evidence establishes that pneumoconiosis was a substantially contributing cause of death.

Complicated Pneumoconiosis

Based on the autopsy/biopsy evidence and noting the physicians who reviewed Mr. Roberts' pathology and medical record only diagnosed simple coal workers' pneumoconiosis, I conclude Mr. Roberts did not have complicated pneumoconiosis. As a result, Mrs. Roberts cannot establish death due to pneumoconiosis under 20 C.F.R. § 718.304.

Death Caused by Pneumoconiosis

None of the physicians who considered the cause of Mr. Roberts' death concluded that coal workers' pneumoconiosis directly killed Mr. Roberts.

Death Caused by Complications of Pneumoconiosis

In the record before Judge Neal, only Dr. Perper opined that the presence of "significant" coal workers' pneumoconiosis and coal-dust related emphysema "directly" lead to the cardiac failure. According to Dr. Perper, the replacement of Mr. Roberts' normal lung tissue with coal workers' pneumoconiosis lesions and emphysema lead to hypoxemia. In turn, the hypoxemia precipitated Mr. Roberts' fatal cardiac arrhythmia. All the other pathologists and physicians to address Mr. Roberts' demise reached a contrary conclusion. These physicians opined the coal workers' pneumoconiosis found during the autopsy/biopsy of Mr. Roberts' lungs was too mild or minimal to have adversely affected his pulmonary functions or played any role in his death. In particular, noting that Mr. Roberts had severe cardiac disease, Dr. Bush additionally emphasized the absence of clinical evidence of hypoxemia during his life. Similarly, Dr. Rosenberg noted Mr. Roberts' pulmonary function tests demonstrated: a) the absence of any pulmonary obstruction or restriction; and, b) the presence of normal pulmonary diffusion. According to Dr. Rosenberg, coal workers' pneumoconiosis would have to cause a significant pulmonary impairment to adversely affect the heart's health. Such significant pulmonary impairment was not present in Mr. Roberts' case.

In assessing this conflicting medical opinion, Judge Neal noted the absence of objective medical evidence to support Dr. Perper's opinion that coal workers' pneumoconiosis-induced pulmonary insufficiency triggered Mr. Roberts' cardiac arrhythmia. According to almost all of the other pathologists and physicians, the objective medical evidence indicated Mr. Roberts did not suffered hypoxemia during his lifetime. Consequently, Judge Neal determined the preponderance of the probative medical opinions by Dr. Naeye, Dr. Branscomb, Dr. Rosenberg, Dr. Castle, Dr. Morgan, and Dr. Bush established that Mr. Roberts' death was not caused by complications of pneumoconiosis. Upon my review of the entire medical record, I reach the same conclusion.

Pneumoconiosis Was a Substantially Contributing Cause Of, Or Hastened, Death

Even though neither pneumoconiosis nor its complications caused Mr. Roberts' death and he did not have complicated pneumoconiosis, Mrs. Roberts may still be entitled to survivor benefits if pneumoconiosis was a substantially contributing cause of her husband's death. Prior to publication of the new regulations, the U.S. Court of Appeals for the Fourth Circuit, like several other federal appellate circuits, interpreted "substantially contributing cause" to include a hastening of a miner's death in any way. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980 (4th Cir. 1992) and *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996). Adopting that standard, the new regulation, 20 C.F.R. § 718.205 (c) (5), states "pneumoconiosis is 'a substantially contributing cause' of a miner's death if it hastens the miner's death." Under this legal standard, if coal workers' pneumoconiosis cut short Mr. Roberts' life in any manner, Mrs. Roberts may prevail with her second modification request and survivor claim.

In his evaluation, Dr. Perper also opined that the presence of coal workers' pneumoconiosis aggravated Mr. Roberts' cardiac condition, thereby "indirectly" contributing to his death. Relying on the pathological findings, and absence of clinical evidence of pulmonary insufficiency, the other pathologists and physicians disagreed and concluded the severity of Mr. Roberts' simple coal workers' pneumoconiosis was too mild or minimal to have contributed to, or hastened, his death in any manner. Based on this overwhelming medical consensus, Judge Neal concluded coal workers' pneumoconiosis was not a contributing factor to, and did not hasten, Mr. Roberts' death. Having again evaluated the medical opinion, I also find coal workers' pneumoconiosis did not contribute to, or hasten, Mr. Roberts' death.

Summary

In her denial of Mrs. Roberts' first modification request, Judge Neal concluded the preponderance of the more probative medical opinion failed to establish that Mr. Roberts' death was due to coal workers' pneumoconiosis. Upon consideration of the entire medical record, I also find the preponderance of the more probative medical opinion establishes that neither coal workers' pneumoconiosis nor its complications caused, contributed to, or hasten the death of Mr. Roberts.

CONCLUSION

Through hearing testimony, pathological evidence, medical opinion, and presumptions, Mrs. Roberts has established that she is an eligible survivor and her husband, Mr. Harmon Roberts, had coal workers' pneumoconiosis. However, upon evaluation of the entire record, I find no mistake in determination of fact occurred in Judge Neal's conclusion, and corresponding denial of Mrs. Roberts' first modification request, that the preponderance of the more probative medical opinion failed to establish that Mr. Roberts' death was due to coal workers' pneumoconiosis. Accordingly, Mrs. Roberts' second modification request must be denied.

ORDER

The second modification request by MRS. JULIA ROBERTS is **DENIED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: June 8, 2006
Washington, DC

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).